Wing Fah Enterprise Sdn Bhd v Matsushita Electronic Components (M) Sdn Bhd

HIGH COURT (SHAH ALAM) — SUIT NO 22–753 OF 2005
SURAYA OTHMAN J
29 APRIL 2011

Contract — Void contract — Non-compliance with statute — Defendant contracted to sell waste scrap metals to plaintiff — Neither party licensed to deal in scrap metals under the Second-Hand Dealers Act 1946 ('the Act') — Whether word 'deal' in s 6 of the Act included both buying and selling of scrap metals — Whether agreement rendered void and incapable of performance — Whether parties could waive license requirement

The plaintiff was in the business of buying and selling scrap metals. The defendant produced and sold electronic components for use in electrical equipment. Various metals were used in the production process including brass, copper, nickel and aluminium. The defendant sold its waste scrap metals to willing buyers. By letter dated 28 June 2004, the defendant invited the plaintiff to make a price quotation for the purchase of the defendant's scrap metals, identified as P1–P6. By letter dated 29 June 2004, the plaintiff provided its quotation. Two days later, the defendant requested the plaintiff to confirm in writing that its quoted prices would remain unchanged for three years. The plaintiff complied as requested. Finally, by letter dated 5 July 2004, the defendant agreed to sell its scrap metals to the plaintiff at the quoted prices and the sale commenced the same day. In that final letter the defendant reminded the plaintiff to abide by all government rules and regulations. In December 2004, the defendant invited another company dealing in scrap metals to give a quotation for the purchase of P1–P6. Although the prices quoted by that company were much higher than the plaintiff's, the defendant entered into a contract with them in January 2005. By letter dated 29 December 2004, the defendant terminated its agreement with the plaintiff and ceased further sales of P1–P6 on the ground the plaintiff did not have a valid license to deal in second hand goods and/or old metal or related items as required by the Second-Hand Dealers Act 1946 ('the Act'). The plaintiff sued the defendant for breach of contract saying the defendant's premature termination of the three-year contract had caused it loss of profits and damages. It said the agreement required the defendant to sell the plaintiff a minimum quantity of P1–P6 at the agreed quoted prices. The plaintiff said prior to terminating the contract, the defendant had never raised any complaint nor made it a requirement for the plaintiff to have a license under the Act. The defendant denied it had any contract to sell a specified amount of scrap metals

to the plaintiff for three years and that even if there was one, it was illegal, void and unenforceable as the plaintiff did not have a license under the Act. The defendant said it was therefore compelled to cease selling P1–P6 to the plaintiff and that it was not liable for any loss or damages the plaintiff might have suffered.

Held, dismissing the plaintiff's claim with costs:

(1) Although the series of letters between the plaintiff and defendant evinced a valid and enforceable agreement for the defendant to sell metal waste or scrap metals to the plaintiff, as and when available, for a three year period at the prices quoted in the plaintiff's letter of 29 June 2004, the failure of both parties to have a license under the Act rendered the agreement illegal, void and incapable of performance (see paras 44 & 72).

(2) Both the plaintiff and defendant were required to have a license under s 6 of the Act because the word 'deal' or 'deal in' under s 6 encompassed both the plaintiff's act of buying and then selling the scrap metals for profit and the defendant's act of selling the scrap metals for profit. This interpretation gave meaningful construction to the word 'deal' in the Act to make the enactment effective and workable for the police to combat crime (see para 69).

(3) The license was a statutory requirement which could not be waived by a party or between parties. Since the agreement was void and unenforceable, the issue of damages did not arise (see para 74(c) & (e)).

(4) Except for P6, which was plastic, P1–P5 were all forms of metal or metal waste or scrap metals or production waste of metal base which came under the definition of 'old iron or metals' which were second hand goods as described and specified under the Second and Third Schedules of the Act (see paras 61 & 74(b)(i)).

(5) P1–P6 could also be categorised as second hand goods within the definition given in the case of *Lau Hee Teah v Hargill Engineering Sdn Bhd & Anor* [1980] 1 MLJ 145 as they were production waste as a result of an industrial process which used, among others, metals, to produce electrical components. As such, they qualified as items which 'had been used when offered for sale' (see para 74(b)(ii)).

[Bahasa Malaysia summary

Plaintif menjalankan perniagaan membeli dan menjual besi serpihan. Defendan menghasilkan dan menjual komponen elektronik untuk digunakan dalam peralatan elektrik. Pelbagai besi digunakan dalam proses pengeluaran termasuk loyang, tembaga, nikel, dan aluminium. Defendan menjual sisa besi serpihan kepada pembeli yang mahu. Melalui surat bertarikh 28 Jun 2004, defendan meminta plaintif membuat sebutharga untuk membeli besi serpihan

defendan, yang dikenal pasti sebagai P1–P6. Melalui surat yang bertarikh 29 Jun 2004, plaintif menyediakan sebut harga. Dua hari kemudian, defendan meminta plaintif mengesahkan secara bertulis bahawa harga yang disebut akan kekal tidak berubah selama tiga tahun. Plaintif menurut seperti yang dikehendaki. Akhirnya, melalui surat yang bertarikh 5 Julai 2004, defendan bersetuju untuk menjual besi serpihan kepada plaintif pada harga yang disebut dan jualan bermula pada hari yang sama. Dalam surat terakhir tersebut, defendan mengingatkan plaintif untuk mematuhi semua peraturan-peraturan kerajaan. Pada Disember 2004, defendan telah meminta satu lagi syarikat yang menjalankan perniagaan besi serpihan untuk memberi sebut harga bagi pembelian P1–P6. Walaupun harga yang disebut oleh syarikat itu adalah lebih tinggi daripada harga plaintif, defendan telah memeterai kontrak dengan mereka pada bulan Januari 2005. Melalui surat bertarikh 29 Disember 2004, defendan menamatkan perjanjian dengan plaintif dan memberhentikan jualan P1–P6 atas alasan plaintif tidak mempunyai lesen sah untuk berniaga barang-barang lain dan/atau besi yang lama atau barangan yang berkaitan sebagai yang dikehendaki oleh Akta Barang-Barang Terpakai 1946 ('Akta'). Plaintif menyaman defendan bagi pelanggaran kontrak, dengan menghujahkan bahawa penamatan pramatang kontrak tiga tahun defendan telah menyebabkan kehilangan untung dan kerugian. Ia menghujahkan bahawa perjanjian tersebut memerlukan defendan untuk menjual plaintif dengan kuantiti minimum P1–P6 pada sebut harga yang dipersetujui. Plaintif menyatakan bahawa sebelum menamatkan kontrak tersebut, defendan tidak pernah membangkitkan sebarang aduan atau menjadikan ia satu keperluan bagi plaintif untuk mempunyai lesen di bawah Akta. Defendan menafikan ia mempunyai sebarang kontrak untuk menjual sejumlah besi serpihan tertentu kepada plaintif selama tiga tahun dan bahawa walaupun terdapat satu, ia adalah menyalahi undang-undang, tidak sah dan tidak boleh dikuatkuasakan kerana plaintif tidak mempunyai lesen di bawah Akta. Defendan menghujahkan ia terpaksa berhenti menjual P1–P6 kepada plaintif dan bahawa ia tidak bertanggungjawab bagi sebarang kehilangan atau kerosakan yang mungkin plaintif alami.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Walaupun siri surat antara plaintif dan defendan memperlihatkan perjanjian yang sah dan boleh dikuatkuasakan bagi defendan untuk menjual sisa besi atau besi serpihan kepada plaintif, dan apabila sedia ada, bagi tempoh tiga tahun pada harga yang dinyatakan dalam surat plaintif bertarikh 29 Jun 2004, kegagalan kedua-dua pihak mempunyai lesen di bawah Akta menjadikan perjanjian itu menyalahi undang-undang, tidak sah dan tidak boleh dikuatkuasakan (lihat perenggan 44 & 72).

(2) Kedua-dua plaintif dan defendan dikehendaki mempunyai lesen di bawah s 6 Akta kerana perkataan 'deal' atau 'deal in' di bawah s 6 merangkumi kedua-dua perbuatan plaintif untuk membeli dan

kemudian menjual besi serpihan untuk mendapat keuntungan dan defendan bertindak menjual besi serpihan untuk keuntungan. Tafsiran ini memberi pembentukan bermakna kepada perkataan 'deal' dalam Akta untuk menjadikan enakmen berkesan dan boleh dilaksanakan oleh polis untuk membanteras jenayah (lihat perenggan 69).

(3) Lesen adalah satu keperluan statutori yang tidak boleh diketepikan oleh satu pihak atau antara pihak-pihak. Memandangkan perjanjian itu tidak sah dan tidak boleh dikuatkuasakan, isu ganti rugi tidak timbul (lihat perenggan 74(c) & (e)).

(4) Kecuali P6, yang merupakan plastik, P1–P5 adalah semua bentuk sisa besi atau besi atau besi serpihan atau sisa pengeluaran asas besi yang berada di bawah takrif 'old iron or metals' yang merupakan barang-barang lain seperti yang dijelaskan dan dinyatakan di bawah Jadual Kedua dan Ketiga Akta (lihat perenggan 61 & 74(b)(i)).

(5) P1 ke P6 juga boleh dikategorikan sebagai barang-barang lain dalam takrif yang diberikan dalam kes *Lau Hee Teah v Hargill Engineering Sdn Bhd & Anor* [1980] 1 MLJ 145 kerana ia adalah sisa pengeluaran akibat proses perindustrian yang menggunakan, antara lain, besi, untuk menghasilkan komponen elektrik. Oleh itu, ia adalah barang-barang yang 'had been used when offered for sale' (lihat perenggan 74(b)(ii)).]

Notes

For cases on non-compliance of statute, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5601–5604.

Cases referred to

Benourad v Compass Group PLC [2010] EWHC 1882; [2010] All ER (D) 338, QB (folld)

Chase Perdana Bhd v Md Afendi bin Hamdan [2009] 6 MLJ 783, FC (refd)

Dato' Abdullah Hishan Hj Mohd Hashim v Sharma Kumari Shukla (No 4) [2001] 5 CLJ 400, HC (refd)

Fitzpatrick Contractors Ltd v Tyco Fire and Integrated Solutions (UK) Ltd [2008] EWHC 1301, CA (folld)

G Percy Trentham v Archital Luxfer [1993] 1 Lloyd's Rep 25; (1993) 63 BLR 44; [1992] BLM (December) 5 (folld)

Lau Hee Teah v Hargill Engineering Sdn Bhd & Anor [1980] 1 MLJ 145, FC (refd)

Malayan Credits Properties (Pte) Ltd v Betz Pte Ltd [1986] 2 MLJ 185 (refd)

McKenzie v Day [1893] 1 QB 289 (refd)

Mirant Asia-Pacific Construction (Hong Kong) Ltd v Ove Arup & Partners International Ltd and another (No 2) [2003] EWCA Civ 1729; [2003] 92 ConLR 1 (folld)

Pagnan SpA v Feed Products Ltd [1987] 2 Lloyd's Rep 601 (folld)

Prabhakaran Muthuvel Achary & 2 Ors v Shanita Holding Sdn Bhd & 5 Ors [2009] 1 LNS 1546, HC (folld)
Sundercan Ltd v Salzman Anthony David [2010] SGHC 92 (folld)
Vitol BV v Compagnie Europeene des Petroles [1988] 1 Lloyd's Rep 574 (refd)
Yung Kong Co Bhd v HHH Tyre Retreading Sdn Bhd & Another Case [2009] 4 CLJ 424, HC (refd)

Legislation referred to

Contracts Act 1950 s 25
Evidence Act 1950 s 114(g)
Licensing Act 1874 [UK] s 17
Second-Hand Dealers Act 1946 ss 3, 6, Second Schedule, Third Schedule

Oh Teik Keng (Foo Hai Ling with him) (Oh Teck Keng & Partners) for the plaintiff.
Kevin Prakash (Hadi Mukhlis Khairulmaini with him) (Shook Lin & Bok) for the defendant.

Suraya Othman J:

INTRODUCTION

[1] The plaintiff's claim against the defendant is for breach of contract. The plaintiff contends that the plaintiff and the defendant had entered into an agreement for the plaintiff to purchase a specified amount of scrap metals from the defendant for a period of three years at an agreed price. The defendant terminated the agreement before the expiry of the three years period. The defendant denied that there was any such agreement, and contends that even if there was such an agreement, the purported agreement is illegal and therefore void and unenforceable as the plaintiff at the material time did not have a valid license to purchase or deal in scrap metals as required under the Second-Hand Dealers Act 1946. The plaintiff now sues the defendant for losses it suffered arising from the defendant's failure to sell the scrap metals to the plaintiff for the entire period of three years.

FACTS OF THE CASE

[2] The plaintiff is a company registered in Malaysia with its address at No 22, First Floor, Jalan Dato Yusuf Shahbudin 44, Taman Mewah Jaya, Off Jalan Sungai Jati, 41200 Klang, Selangor and is in the business of trading, buying and selling in all types of scrap metals.

[3] The defendant is a company registered in Malaysia with its address at No 1, Jalan SS 8/4, Sungai Way Free Industrial Zone, 47300 Petaling Jaya, Selangor and is in the business of producing and selling electronic components

for use in various electrical equipment. The primary materials used in the production of the electronic components are various metals including, inter alia, brass, copper, nickel, silver and aluminium. The company disposes off its metal waste (or scrap metals) from the production of the said electronic components by selling it off to willing buyers.

[4] By its letter dated 28 June 2004, the defendant invited the plaintiff to provide the defendant with a quotation of its proposed purchase price of the defendant's scrap metals, P1–P6 (see p 228, bundle A).

[5] By its letter dated 29 June 2004, the plaintiff submitted to the defendant its quotation of its proposed purchase price of the defendant's scrap metals, P1–P6 (see pp 1–2, bundle A).

[6] The defendant then informed the plaintiff by its letter dated 1 July 2004 that the plaintiff is required to follow strictly to its quotation as stated in its letter of 29 June 2004 for three years continuously and that there will be no price changes until the next contract term. The defendant requested the plaintiff to confirm in writing that the price will be enforced for the next three years (see p 4, bundle A).

[7] The plaintiff replied and confirmed by its letter, also dated 1 July 2004, that it is committed to its 29 June 2004 quotation and that the price will be maintained for the contract term of three years and will not vary according to market price (see p 3, bundle A).

[8] By its letter dated 5 July 2004, the defendant then informed the plaintiff that the defendant will sell its scrap metals to the plaintiff at the agreed price as stated in the plaintiff's letter dated 29 June 2004. The defendant also reminded the plaintiff to abide by all the rules and regulations of government requirement (see p 232, bundle A). For ease of reference, these letters in paras 3–7 will collectively be referred to as 'the series of letters'. The defendant then began selling scrap metals to the plaintiff on 5 July 2004.

[9] In December 2004, the defendant invited ALH Industries Sdn Bhd ('ALH lndustries'), a company dealing in scrap business to give a quotation on items P1–P6. The prices quoted by ALH Industries far exceeded the plaintiff's quotation since it reflected the higher market prices of scrap metals in December 2004. The defendant accepted ALH Industries quotation and entered into a contract with them in January 2005.

[10] By its letter dated 29 December 2004 the defendant terminated the agreement and ceased further sales of items P1–P6 to the plaintiff. The reasons given for the termination was that the defendant had discovered that the

plaintiff did not have a valid license as required under the Second-Hand Dealers Act 1946 ('the Act') 'to deal in second hand goods and/or old metal or related items' and therefore the defendant 'shall cease all sales of our scrap metal waste to you (the plaintiff) with immediate effect'. A

[11] The plaintiff then filed this suit against the defendant for breach of contract. B

THE PLAINTIFF'S CASE

[12] The plaintiff contends that there was an agreement between the plaintiff and the defendant for the plaintiff to purchase a minimum quantity of scrap metal, P1–P6 from the defendant at an agreed price for the duration of three years. This was confirmed by the plaintiff's managing director, Mr Ang Wing Fah, PW4, as well as the defendant's former employee, Mr I Ravindran Iyiappan, PW5, who was the defendant's purchasing manager at the material time. C D

[13] The plaintiff contends that on 5 July 2004, the defendant started selling the scrap metals to the plaintiff at the agreed price as stated in the plaintiff's letter dated 29 June 2004 and from that date till 29 December 2004, there were no complains made by the defendant. E

[14] The plaintiff contends that the defendant had never made it a requirement for the plaintiff to have a license under the Second-Hand Dealers Act 1946. The plaintiff contends that before the defendant accepted the plaintiff's quotation, the defendant conducted an audit on the plaintiff and inspected the plaintiff's factory. PW4 and PW5 confirmed that throughout the audit process, the defendant had never enquired whether the plaintiff had any license under the Second-Hand Dealers Act 1946. PW5 confirmed receiving the plaintiff's profile which made no mention of any license required under the Act. PW5 agreed that he did not enquire from the plaintiff about any license since the defendant was not selling second hand goods but production waste which did not need a license. F G

[15] The plaintiff contends that the defendant terminated its agreement with the plaintiff after the defendant entered into a contract with ALH Industries which quoted a higher market price of scrap metals. H

[16] The plaintiff contends that by terminating the agreement before the expiry of the three years period, the defendant acted in breach of contract and caused the plaintiff to suffer losses. I

THE DEFENDANT'S CASE

[17] The defendant denies that there was any contract between the plaintiff

and the defendant which requires the defendant to sell a specified amount of metal waste or scrap metals to the plaintiff for a period of three years. In this connection, the defendant by its letter dated 5 July 2004 only agreed to sell its metal waste or scrap metals, at the agreed price, if and when it does sell metal waste or scrap metals to the plaintiff.

[18] The defendant contends that even if there was an agreement between the plaintiff and the defendant for the sale and purchase of the defendant's scrap metals, the purported agreement is illegal and therefore void and unenforceable as the plaintiff did not at the material time hold the necessary license to purchase or otherwise deal in scrap metals, second hand goods and/or metal or related items as required under the Second-Hand Dealers Act 1946.

[19] In this regard, the defendant contends that the plaintiff is the architect of its own demise when it failed to comply with the defendant's instructions as stipulated in defendant's letter of 5 July 2004 that the plaintiff was to comply with all legal and regulatory requirements related to its purchase of the defendant's scrap metals. In this connection, the plaintiff had failed and/or refused to obtain the required license to purchase or otherwise deal in scrap metals, second hand goods and/or metal or related items as required under the Second Hand-Dealers Act 1946. As such since the purported agreement is illegal and therefore void, the defendant was left with no choice but to cease its selling of scrap metals to the plaintiff.

[20] In view of the above, the defendant contends that it is not liable for any of the purported loss of profit and damages suffered by the plaintiff.

[21] In addition, the defendant contends that the loss of profits claimed by the plaintiff is too remote and not foreseeable. In any event, the plaintiff has also failed to prove that it had taken steps to mitigate its purported loss of profit.

ISSUES TO BE TRIED

(a) Whether there was a valid and enforceable agreement which requires the defendant to sell metal waste or scrap metals to the plaintiff for a period of three years at a fixed price as quoted in the plaintiff's letter dated 29 June 2004.

(b) If there was a valid agreement, whether the plaintiff was required under the law to have a license under the Second-Hand Dealers Act 1946 for the purchase or otherwise dealing in metal waste or scrap metals.

(i) Whether P1–P6 are metal waste or scrap metals.

(ii) Whether P1–P6 are second hand goods under the Act.

(iii) What constitute dealing under s 6 of the Act (definition of the word 'deal' or 'deal in'). A

(c) If a license under the Second-Hand Dealers Act 1946 is required, whether the defendant by its acts has waived such requirement; whether a party can waive a statutory requirement. B

(d) Whether the failure to have a license renders the agreement between the parties illegal and therefore void and unenforceable.

(e) Damages (if any) to be assessed by the assistant registrar. C

FINDINGS OF THE COURT

Whether there was a valid and enforceable agreement which requires the defendant to sell metal waste or scrap metals to the plaintiff for a period of three years at a fixed price as quoted in the plaintiff's letter dated 29 June 2004 D

[22] The plaintiff called five witnesses and the second defendant's witnesses to testify in this case. E

[23] The defendant contends there was no proper written contract entered into between the plaintiff and the defendant unlike the one which it entered with ALH Industries on January 2005, where both parties signed the contract. The defendant contends that both PW4, Mr Ang Wing Fah, the plaintiff's managing director and PW5, Mr I Ravindran Iyiappan, the defendant's former purchasing manager unreservedly said that the alleged agreement was found in the documents at pp 245–249 of bundle A and that they did not in their testimonies say that the alleged agreement is found in the letter of 5 July 2004 or collectively in 'the series of letters' between the plaintiff and the defendant. As documents at pp 245–249 of bundle A, the alleged agreement, was not admitted into evidence and remains an ID document, there is no evidence to support the plaintiff's claim and as such the claim should be dismissed. Further, the defendant submitted that the series of letters, read collectively or otherwise, do not form an alleged agreement between the plaintiff and defendant and that the plaintiff in its submissions has completely steered away from their own witnesses' testimonies by referring to the series of letters between the plaintiff and defendant as the alleged contract. F G H

[24] Though the court agreed with the defendant that the alleged agreement at pp 245–249 of bundle A, marked as an ID, cannot support the plaintiff's claim, the fact remains that there were a series of letters exchanged between the parties which cannot be ignored and must be considered by this court to determine whether an agreement did exist. I

[25] The plaintiff in their submissions submitted that from the series of letters, a valid contract existed as there was an offer and an acceptance of the offer which is supported by mutual promises by the defendant to supply the scrap metals, in consideration for the plaintiff to pay the agreed price for the entire three years period.

[26] Perusing through the series of letters, I find that there was indeed an offer made by the plaintiff in its letter dated 29 June 2004 when it submitted its quotation of its proposed purchase price of the defendant's scrap metals, P1–P6 after being invited by the defendant to do so in the defendant's letter dated 28 June 2004. *The offer letter dated 29 June 2004 (at pp 1–2, bundle A)* is as per below:

WING FAH ENTERPRISE SDN BHD (293768–M)

No. 22, 1st Floor, Jalan Dato Yusof Shahbudin 44, Taman Mewah Jaya,

Off Jalan Sungai Jati, 41200 Klang, Selangor Darul Ehsan

Tel: 03–51619906/51612406/51613706 Fax: 03–51619806

Your Ref:

Our Ref:

29th June 2004

MATSUSHITA ELECTRONIC COMPONENTS (M) SDN BHD

No. 1, Jalan SS 8/4, Sungei Way

Free Industrial Zone, 47300 Petaling

Jaya, Selangor Darul Ehsan.

Attn: Management Committee

Dear Sir,

QUOTATION FOR SCRAP METAL COLLECTION

In reference to the above caption, we take opportunity to inform your good self that we have already submitted our quotation on Scrap Metal Collection on 22nd June 2004 (copy enclosed). Unfortunately, at that moment we were unable to quote for PBT and we also unaware that this quotation should be submitted through 'tendering' system.

Therefore, we are now submitting this quotation again (with PBT) hoping that it will be at your favour and given due consideration as our earlier quotation was not confidential, subsequently not competitive anymore.

No.	Part Name/Part Number	Monthly Cons.	(RM) per ton
1.	Brass	200 kg.	4,200
2.	Copper	1110 kg.	5,500
3.	Nickel Silver	20 ton	5,200
4.	Aluminium Dust	500 kg.	2,500
5.	Aluminium Rod		3,800
6.	Duranex PBT	8 ton	750 (excluding tax)

We also would like to highlight that at interim we are fulfilling our business partner, PRESS METAL BERHAD's huge amount of scrap metal requirement for their increasing production needs.

Therefore, we sincerely hope to be successful in obtaining this tender for the metal scrap collection from your esteem organization.

Please do not hesitate to contact the undersigned if there is any further clarification needed.

Thanking you in advance.

Yours faithfully,

WING FAH ENTERPRISE SDN BHD

tt.

(WF Ang)

[27] The defendant then replied by its letter dated 1 July 2004 (p 4, bundle A), asking the plaintiff to follow the quotation strictly for three years continuously. The defendant stated that it will not approve of any price changes until the next contract term and requested the plaintiff to follow the defendant's rules and regulations on scrap sales. This letter (p 4, bundle A) is as per below:

National/Panasonic

Matsushita Electronic Components (M) Sdn Bhd (13394–M)

No. 1, Jalan SS 8/4, Sungei Way Free Industrial Zone, 47300 Petaling Jaya,

Selangor Darul Ehsan, Malaysia. P.O. Box 8126, Pejabat Pos Kelana Jaya,

46782 Petaling Jaya.

Tel No: 03–74915888 (30 Lines) Fax No: 03–74915889 (General)

To,

Wing Fah Enterprise Sdn Bhd,

22 1st Floor, Jalan Data Yusof Shahbuddin 44,

Taman Mewah Jaya,

Off Jalan Sungai Jati,

41200 Klang, Selangor.

01st July 2004.

Attention:

Mr. W.F. Ang

RE: PENDING MATTER ON SCRAP TENDER

Please be informed that we need you to strictly follow to the quotation given to us during the tendering period for 3 years continuously. We will not approve on any price changes until the next contract term. This is base on our present experience with scrap contractor. Reasons such as LMW price various, updown on market price and material contents have change or any other reasons will not be entertained.

We need you to write to us in writing that your tender price will be enforce for the next 3 years and we will endorse your letter with our agreement which will be sign soon if you are offered.

Hope you'll follow to Mecom's rules and regulations on scrap sales and give your full cooperation.

Thank you.

Regards.

tt.

.....

(I. Ravindran)

(Purchasing Manager)

Note: Letter should be send personally to Ms. Saras by 12.00 noon tomorrow (02.07.2004).

[28] The plaintiff then replied by its letter dated the same date, 1 July 2004, that it will be committed to its earlier quotation submitted on 29 June 2004 and will not change its pricing for the contract term of three years notwithstanding that there will be variations on market price. This letter (p 3, bundle A) is as per below:

WING FAH ENTERPRISE SDN BHD (293768–M)

No. 22, 1st Floor, Jalan Dato Yusof Shahbudin 44, Taman Mewah Jaya, Off

Jalan Sungai Jati, 41200 Klang, Selangor Darul Ehsan

Tel: 03–51619906/51612406/51613706 Fax: 03–51619806

Your Ref:

Our Ref:

1st July 2004

MATSUSHITA ELECTRONIC COMPONENTS (M) SDN BHD

No. 1, Jalan SS 8/4, Sungei Way

Free Industrial Zone, 47300 Petaling Jaya,

Selangor Darul Ehsan

Attn.

Mr. I. Ravindran.

Dear Sir,

COMMITMENT FOR SCRAP METAL COLLECTION

In reference to the above caption, we take this opportunity to inform your good office that we will be committed to the earlier quotation submitted during tendering, dated 29th June 2004 (copy enclosed) on Scrap Metal Collection. We will not change our pricing for the contract for the contract term (3 years) offered, even though there will be variations on market prices.

We hope the above is at your favour, and please do not hesitate to contact the undersigned if there is any further clarification needed.

Thanking you in advance.

Yours faithfully,

WING FAH ENTERPRISE SDN BHD

tt.

(WF Ang)

[29] The defendant then replied in its letter dated 5 July 2004 informing the plaintiff that the plaintiff is selected to purchase the defendant's scrap at the price offered by the plaintiff in its letter dated 29 June 2004. The defendant stated that it will prepare the agreement and reminded the plaintiff to follow all rules and regulations of government requirement. *This letter to my mind is the acceptance letter. This letter (p 232, bundle A)* is as per below:

National/Panasonic

Matsushita Electronic Components (M) Sdn Bhd (13394–M)

No. 1, Jalan SS 8/4, Sungei Way Free Industrial Zone, 47300 Petaling Jaya,

Selangor Darul Ehsan, Malaysia. P.O. Box 8126, Pejabat Pos Kelana Jaya,

46782 Petaling Jaya.

Tel No: 03–74915888 (30 Lines) Fax No: 03–74915889 (General)

To,

Wing Fah Enterprise Sdn Bhd,

22 1st Floor, Jalan Dato Yusof Shahbuddin 44,

Taman Mewah Jaya,

Off Jalan Sungai Jati,

41200 Klang, Selangor.

5th July 2004

Attention:

Mr. W.F. Ang

RE: SCRAP SALES

Please be informed that you are selected to purchase our scrap at the price you have offered us on 29 Jun 2004.

As for the agreement we are now preparing the proper and will call you to discuss on the process on a later date.

Therefore please follow all rules and regulation of government requirement.

Thank you very much.

Regards.

tt.

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(I. Ravindran)

(Purchasing Manager)

[30] Therefore from the series of letters above, starting with the offer letter dated 29 June 2004 from the plaintiff till the acceptance letter dated 5 July 2004 from the defendant, a valid contract exist. This is so as there was an offer and an acceptance of the offer which is supported by mutual promises by the defendant to supply the scrap metals, in consideration for the plaintiff to pay the agreed price for the entire three years period. This is supported by PW4 and PW5's evidence that there was an agreement between the plaintiff and the defendant for the plaintiff to purchase scrap metals, P1–P6 at an agreed price for the duration of three years. PW5 stated that there was an alleged factory management team which included himself, one Mr Nayouki Yayama (the factory head) and Mr Jeya Shekaran (assistant general manager who is PW5's immediate superior). It was this team, according to PW5, which allegedly decided to sell the scrap to the plaintiff. Once this team decides to do something they go ahead with their decision and management will endorse it. This testimony by PW5 was never challenged.

[31] Further, PW4 stated that the plaintiff would continue to buy from the defendant at the quoted (agreed) price even if the market prices of the scrap metals fall and PW4's testimony is corroborated by PW5's evidence. The testimonies of both PW4 and PW5 are reflected in the exchange of letters from the defendant dated 1 July 2004 (p 4, bundle A) and from the plaintiff dated 1 July 2004 (p 3, bundle A). The evidence of both PW4 and PW5 were again not challenged.

[32] The defendant called DW2, its senior manager from the corporate and legal affairs, Mr Tee Lian Huat who testified that he has no personal knowledge of the case since it was dealt by the purchasing department. DW2's evidence is totally unhelpful and completely failed to challenge PW4 and PW5's evidence which remained intact. Further, the defendant failed to call three crucial witnesses, Mr Nayouki Yayama (the factory head), Mr Jeya Shekaran (assistant general manager) and Mr Kishigami (managing director) who are acquainted with events that happened in 2004 to 2005 and who can refute the plaintiff's claim. An adverse inference ought to be drawn against the defendant under s 114(g) Evidence Act 1950 for refusing to call these people to give evidence, in that if these three people were called, they would give evidence favouring the plaintiff (*Dato' Abdullah Hishan Hj Mohd Hashim v Sharma Kumari Shukla (No 4)* [2001] 5 CLJ 400 and *Yung Kong Co Bhd v HHH Tyre Retreading Sdn Bhd & Another Case* [2009] 4 CLJ 424 at p 440 referred to).

[33] Apart from that, the defendant started selling the scrap metals, P1–P6 to the plaintiff at the agreed price for a period of six months from 5 July 2004 till 29 December 2004. There were no complains during the six months duration. This indicated to my mind a clear intention on the part of the defendant to enter into a binding legal relationship.

[34] *Therefore from the series of letters, the testimonies of the plaintiff's and defendant's witnesses, especially PW4, PW5 and DW2 and their actions, can it be said that there were intentions between the parties to enter into a binding contract?*

[35] In this regard I should be guided by the principles expounded in the case of *Vitol BV v Compagnie Europeene des Petroles* [1988] 1 Lloyd's Rep 574 (at p 576) where Saville J stated:

> The approach of the English law to questions of the true construction of contracts of this kind is *to seek objectively to ascertain the intentions of the parties from the words which they have chosen to use. if those words are clear and admit of only one sensible meaning, then that is the meaning to be ascribed to them — and that meaning is taken to represent what the parties intended.*

[36] The other leading authority is *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601 where it was held:

> The court's task was to review what the parties said and did, and from that material infer whether the parties' objective intentions, *as expressed to each other*, were to enter into a mutually binding contract (*Lynch v Kirby* [2010] All ER (D) 114) referred to.

The key words are 'the parties' objective intentions, *as expressed to each other*.

[37] In *Sundercan Ltd v Salzman Anthony David* [2010] SGHC 92, the Singapore High Court held:

> For the formation of a contract, an offer must be accepted. The court took the position that it should 'examine the whole of the documents and decide from them whether the parties did reach an agreement upon all material terms in such circumstances that the proper inference is that they agreed to be bound by those terms'.

[38] In *Mirant Asia-Pacific Construction (Hong Kong) Ltd v Ove Arup & Partners International Ltd and another (No 2)* [2003] EWCA Civ 1729; [2003] 92 ConLR 1, the Court of Appeal referred to *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601 and held:

> Where correspondence and exchanges between the parties have continued over a period, the court must consider all these exchanges in context and *not seize upon one episode in isolation* in order to conclude that a contract has been made.

[39] In *Fitzpatrick Contractors Ltd v Tyco Fire and Integrated Solutions (UK) Ltd* [2008] EWHC 1301 (TCC), the court quoted with approval the remarks of Steyn LJ, (as he then was), in *G Percy Trentham v Archital Luxfer* [1993] 1 Lloyd's Rep 25; (1993) 63 BLR 44; [1992] BLM (December) 5 (CA) when he said:

> The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often be difficult to submit that the contract was void for vagueness or uncertainty. Specifically, the fact that the transaction was executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised as inessential.

[40] In our instant case, the transaction was performed by both the plaintiff and the defendant for the duration of six months from 5 July 2004 till 29 December 2004. Therefore, the transaction of buying and selling the scrap metals by both parties was executed making it unrealistic to argue that there was no intention to enter into legal relations.

[41] In *Benourad v Compass Group PLC* [2010] EWHC 1882; [2010] All ER (D) 338 (QB) the court decided:

> Where the case is not a 'subject to contract' or 'subject to written contract' type of case, the fact that the services have been rendered is a particularly important factor and there is likely to be a contract on the terms that were agreed.

[42] Our instant case is not a 'subject to contract' or 'subject to written contract' type of case. It is not disputed that the defendant had sold scrap metals to the plaintiff from 5 July 2004 till 29 December 2004. According to *Benourad*'s case the fact that the services have been rendered is a particularly important factor and there is likely to be a contract on the terms that were agreed.

[43] The defendant argued that there is a requirement for 'documentary foundation' before contracts can exist in Malaysia. Again, authority for this basic proposition of law can be found in *Prabhakaran Muthuvel Achary & 2 Ors v Shanita Holding Sdn Bhd & 5 Ors* [2009] 1 LNS 1546 where the High Court held:

> There is a valid contract, oral or otherwise only if two or more persons are said to consent when they agree upon the same thing in the same sense (see s 13 of the Contracts Act 1950) per Justice Anantham Kasinather JC.

[44] Therefore, after taking into consideration all the cases above and applying it to the circumstances of our instant case, I find that there is a valid and enforceable agreement evinced from the series of letters between the plaintiff and the defendant which requires the defendant to sell metal waste or scrap metals to the plaintiff, as and when the metal waste or scrap metals are available, for a period of three years at a fixed price as quoted in the plaintiff's letter dated 29 June 2004.

If there was a valid agreement, whether the plaintiff was required under the law to have a license under the Second-Hand Dealers Act 1946 for the purchase or otherwise dealing in the scrap metals

[45] The defendant claimed that the metal waste or scrap metals, P1–P6 are second hand goods within the meaning of the Second-Hand Dealers Act 1946 and as such the plaintiff requires a license to deal in it. The failure to obtain the license renders the said agreement between the parties illegal and therefore void and unenforceable.

[46] The plaintiff claimed that it was only purchasing 'production waste' as opposed to scrap metals or second hand goods and is therefore not subject to

the licensing requirement under the Act. It must be noted that the plaintiff in its own pleadings referred to the items P1–P6 it purchased from the defendant as 'scrap metal' and 'besi hancur'. The plaintiff in para 2 of the statement of claim defines 'bahan hancur' as 'scrap metal'. PW5 confirmed during trial that the items in P1–P6 are in fact scrap. The plaintiff's case is based on an alleged loss as a result of its inability to sell the scrap metals which it wants to buy from the defendant. Therefore the plaintiff cannot now blow hot and cold and run away from its own pleading.

[47] *Be as it may, the question that begs to be answered here is whether P1–P6 are metal waste or scrap metals and if they are metal waste or scrap metals, whether they come within the definition of second hand goods which requires a person to have a license to deal in it.*

[48] The defendant called ASP Annadurai a/l Muthu Karuppan, DW1, who was a former licensing officer from the Ibu Pejabat Kontinjen Selangor who had about 12 months experience in dealing with the Second-Hand Dealers Act 1946. According to DW1, the chief police officer ('CPO') and those he deputed his power to are the licensing officers who issue the license under the Act. DW1 in his testimony states that items P1–P6 are scrap metals and that they are considered as second hand goods. A company dealing in scrap metals must have a license from the police as required under the Act and failure to have one means that the company is committing an offence and liable to a fine or imprisonment under s 9 of the Act. The requirement for a license is for security reasons and to prevent criminal activities as there are instances where telecommunication companies had reported stolen items like cable and metal by second hand dealers. In cross examination, DW1 agreed that the phrase 'scrap metal' is not found in the said Act but stated that the phrases 'old iron and metals' are found in the second schedule. In re-examination, DW1 agreed that the police licensing department considered 'old iron and metals' to constitute as scrap metals. DW1 understand the word 'deal' to mean to receive, purchase, sell and deliver but opined that a company selling P1–P6 is not committing an offence.

[49] The plaintiff called Ms Ang Chuei Peng, PW2, ALH Industries business development manager, whose company entered into a contract with the defendant in January 2005 to buy scrap from the defendant resulting in the defendant terminating its agreement with the plaintiff. PW2 confirms that since her company is in the scrap business, it is compulsory to obtain a police license to deal in 'besi hancur' or scrap metals. She also confirmed that her company has the required license from the police since 2003 and before the commencement of the contract with the defendant in January 2005.

[50] The plaintiff was also aware that it needed a license to deal in scrap

metals. It has applied to the Ketua Polis Daerah Klang on 18 August 2004 for a license to trade in 'barang-barang lusuh (besi buruk)' — used items (old iron). This can be seen from the correspondences from the police to the plaintiff, both dated 6 September 2004 at pp 75–76 of bundle A, informing the plaintiff that its application for a license to deal in 'barang-barang lusuh (besi buruk)' is under consideration. Therefore, it can be inferred that after the plaintiff received the defendant's letter dated 5 July 2004 requiring the plaintiff to 'follow all rules and regulations of government requirement', the plaintiff immediately took action to comply by applying for a license.

[51] Coming back to the issue as to whether P1–P6 are metal waste or scrap metals which comes under the definition of second hand goods, a perusal of the said Act discloses that the Act was enacted to provide for the control and licensing of dealers in second hand goods. The next question is whether the Act defines what constitute second hand goods.

[52] Section 3 states:

> Licensing officers
>
> 3 In each State the Chief Police Officer shall be the licensing officer but he may depute his powers in respect of any district of such State to any police officer not below the rank of Inspector.

[53] Section 6 states:

> Licences
>
> 6 No person unless exempted from this section shall deal in second-hand goods except in accordance with the conditions of a licence issued under this Act in the form in the First Schedule, and in the place specified in the licence:
>
> > Provided that any person who deals exclusively in the goods specified in the Second Schedule or any of them may be granted a licence in the form in the Third Schedule. Sections 7, 12, 13, 15 and 16 shall not apply to such licence, nor need the licence specify his place of business, but every such licence shall carry his licence on his person and shall produce the same for inspection at any time on demand by any police officer.

[54] Section 6 of the Act states that 'No person unless exempted from this section *shall deal in second hand goods except in accordance with the conditions of a license* issued under this Act in the form in the First Schedule, and in the place specified in the license'. However, s 6 also says that 'Provided that any person who deals exclusively in the goods specified in the Second Schedule or any of them may be granted a license in the form in the Third Schedule'. The Second Schedule of the Act does specifically refer to, among others, *old iron and metals*

other than brass, copper, lead, zinc and block tin. The Third Schedule which is the license proper also states the same. For easy reference, the First, Second and Third Schedules are spelt out below.

FIRST SCHEDULE

[Section 6]

Federal Territory/State of.....

SECOND-HAND DEALERS ACT 1946

LICENCE TO DEAL IN SECOND-HAND GOODS

Permission is hereby granted to

Full name.....

Occupation.....

to deal in second-hand goods at.....

(here state the address of the licensed premises) subject to the provisions of the Second-hand Dealers Act 1946 and of any rules and order for the time being in force thereunder and to the following conditions:

Fee paid RM.....

.....

Chief Police Officer

SECOND SCHEDULE

[Section 6]

(a) Gunny bags, sail cloth, canvas.

(b) Bottles.

(c) *Old iron and metals* other than brass, copper, lead, zinc and block tin.

(d) Wooden and tin-lined boxes and cases

(e) Kerosene tins, old drums, and other similar empty receptacles.

THIRD SCHEDULE

[Section 6]

Federal Territory/State of.....

Permission is hereby granted to.....of.....to deal in second-hand goods of the description thereunder mentioned.

(a) Gunny bags, sail cloth, canvas.

(b) Bottles.

(c) *Old iron and metals* other than brass, copper, lead, zinc and block tin.

(d) Wooden and tin-lined boxes and cases.

(e) Kerosene tins, old drums, and other similar empty receptacles.

.....
Chief Police Officer

[55] Again, are P1–P6 scrap metals that comes under the definition of second hand goods?

[56] In the case of *Lau Hee Teah v Hargill Engineering Sdn Bhd & Anor* [1980] 1 MLJ 145, the Federal Court unequivocally state that 'second-hand' means 'has been used when offered for sale' per His Lordship, Wan Hamzah J at p 146.

Therefore, can P1–P6 be categorised as items which 'has been used when offered for sale'?

[57] The defendant produces electronic components for use in various electrical equipment. The primary materials used in the production of the electronic components are various metals including, inter alia, brass, copper, nickel, silver and aluminium. In producing these electronic components, what is left over is metal waste, scrap material, surplus (*sisa*) from an industrial process. Can these 'left overs' qualify as second hand goods?

[58] P1 is nickel silver; P2 is brass dust; P3 is aluminium rod; P4 is aluminium dust; P5 is copper and P6 is PBT duranex. P1, nickel silver is a composition of copper, zinc and nickel. P6, PBT duranex according to the plaintiff's counsel, Mr Oh Teik Keng, is plastic. Therefore, with the exception of P6, *P1–P5 are all forms of metal or metal waste or scrap metals or production waste of metal base*. All these items P1–P6 can qualify as 'having been used' in the sense that they are production waste as a result of an industrial process which use, among others, metals, to produce electrical components. *As such, I am of the opinion that P1–P6 are items which have been used and they qualify to be categorised as second hand goods within the meaning of Lau Hee Teah*.

Again, does the Act defines second hand goods?

[59] DW1, ASP Anadurai gave evidence that he as a former licensing officer and the police licensing department considered P1–P6 as scrap metals and that it comes under the definition of 'old iron and metals' under the second schedule of the Act. As such a license is required to deal in P1–P6.

[60] PW2, Ms Ang Chuei Peng, the business development manager of ALH Industries, whose company is in the scrap business and who entered into a contract with the defendant's company to buy scrap metals in January 2005

agreed that it is compulsory to obtain a license from the police to deal in scrap metals. She confirmed that her company has the required license from the police since 2003 and before the commencement of the contract with the defendant in January 2005.

[61] In perusing the Second and Third Schedule of the Act, both schedules specifically refer to 'old iron and metals' as being items that require a license to deal in. The Third Schedule, which is the license proper specifically states that permission has to be granted by the CPO before a person can deal in second hand goods and described 'old iron and metals', among others, as second hand goods. *Since P1–P5 are all forms of metal or metal waste or scrap metals or production waste of metal base, I am of the opinion that it can come under the definition of 'old iron and metals' which are second hand goods as described and specified in the Second and Third Schedule of the Act*. P6, however is not since it is plastic. Therefore, since P1–P5 are second hand goods under the Act a license has to be issued or granted by the CPO or those officers he deputed his power to before a person can deal in metal waste or scrap metals.

What constitute dealing under s 6 of the Act (definition of the word 'deal or 'deal in')?

[62] The defendant contends that the plaintiff requires a license to purchase or otherwise deal in scrap metals. The defendant then submitted that the requirement of a license does not apply to them. The point of sale of the scrap metals was done at the defendant's premises. The plaintiff had to arrange for transport to collect the scrap metals from the defendant's premises. The defendant submitted that the word 'deal' means 'to receive, purchase, sell and deliver and that it should be read conjunctively as a whole. The defendant argued that since it only sells and not receive, purchase and deliver the scrap metals to the plaintiff, it is not required to have a license. The defendant's line of reasoning is supported by the evidence of ASP Annadorai ('DW1').

[63] The plaintiff on the other hand contends that the words 'to receive, purchase, sell and deliver' should be read disjunctively to give meaning to the Act.

[64] As stated before, the Second-Hand Dealers Act 1946 was enacted to provide for the control and licensing of dealers in second hand goods. ASP Annadorai, DW1, a former licensing officer testified that the requirement for a second hand dealer to be licensed is for security reasons and to prevent criminal activities by them. Section 6 is crystal clear in that a person, unless exempted by the Act shall be licensed to deal in second hand goods.

Again, what then constitute dealing under this Act? A

[65] The word 'deal' is not defined under the Act. The word 'licensed dealer' though is defined as 'a dealer licensed under this Act or exempted from being so licensed who deals in second-hand goods only, or in such goods together with goods which is not second-hand'. B

[66] Under the *Oxford Dictionary*, (9th Ed), the word 'deal' is defined as, among others, to 'do business with, sell or be concerned with commercially, distribute, cause to be received, business arrangement, a transaction'. The word 'dealer' is defined as 'a person or business dealing in' and the word 'dealing' as 'contacts or transactions, especially in business'. C

[67] In the case of *McKenzie v Day* [1893] 1 QB 289, the respondent was found buying intoxicating liquor on unlicensed premises and was summoned before a magistrate under s 17 of the Licensing Act 1874 for 'illegally dealing' in intoxicating liquor. The magistrate dismissed the summons, being of the opinion that the expression 'dealing' in s 17 meant trading or selling, and that a person who was merely buying intoxicating liquor on unlicensed premises was not 'dealing' in it within the meaning of the section. On appeal of the magistrate's decision, it was held that the expression 'illegally dealing' must be taken to include the purchasing as well as the selling of intoxicating liquor upon unlicensed premises, and that a person so purchasing liquor is guilty of an offence under the above section. Lord Coleridge CJ stated in his judgment: D E F

> I am of the opinion that the decision of the learned magistrate was wrong, and that he ought to have convicted the respondent. He refused to do so on the ground that the expression 'illegally dealing', as used in s 17, does not include buying as well as selling; but to this contention there seem to be many answers. *The plain meaning of the word 'deal' unquestionably extends to buying as well as selling; there must be two parties to what is called a 'deal'; a man cannot deal with himself; there must be some one else for him to deal with.* One object of the Act of Parliament was to prevent that from going on in private houses which the legislature had made illegal in public houses, and this section is a very stringent one: it creates a presumption that, where on unlicensed premises a quantity of liquor is found, and a number of persons are collected together, the persons on the premises are illegally dealing in the liquor, unless the contrary is shown. There can be no doubt that what was being done in the present case was illegal, and that the persons found on the premises were joining in doing an act which cannot be done by one person alone; *it is impossible to evade the plain meaning of the section, under which an act which is illegal on the part of the seller is also illegal on that of the buyer. I can entertain no doubt that 'illegally dealing' includes both buying and selling*; and as the only real ground of the magistrate's decision was that he took a different view of the meaning of that expression, this case must be remitted to him for the purpose of convicting the respondent. G H I

[68] In the case of *Malayan Credits Properties (Pte) Ltd v Betz Pte Ltd* [1986] 2 MLJ 185, the Singapore High Court held that 'a meaningful construction ought to be adopted'. Thean J in this case applied the maxim or the principle of interpretation 'ut res magis valeat quam pereat' meaning 'that the thing may rather have effect than be destroyed' to give meaning or purpose to a clause or to give preference to a construction that makes the Act workable. Thean J quoted para 785 of Vol 1 of *Chitty on Contracts*, (25th Ed):

> 785 Saving the document. In order to give effect to the intention of the parties and to 'save' the document, if possible, the court will adopt various expedients. This rule is often expressed in the phrase ut res magis valeat quam pereat. That is to say, if by any reasonable construction the intention of the parties can be arrived at and that intention carried out consistently with the rules of law, the court will take that course. So the court will go to the trouble of reforming the document either by restricting, supplying, transposing, rejecting or modifying words or terms in the document, provided the intention of the parties is plain in spite of the words.

[69] In *McKenzie v Day*'s case, the word 'deal' was given its plain meaning which extends unquestionably to buying or purchasing as well as selling. As stated by Lord Coleridge, there must be two parties to what is called a 'deal': a man cannot deal with himself; there must be someone else for him to deal with. Therefore, taken in the context of our present case, the plaintiff who buys and then sells the scrap metals for profits and the defendant who sells the scrap metals for profits are both considered to have dealt in or have dealings in scrap metals. The word 'deal' under s 6 encompasses the act of buying or purchasing as well as selling. Since scrap metals are considered by me as second hand goods under the Act, the plaintiff and defendant are not spared from the statutory requirement of having a license before dealing in it. This disjunctive interpretation is taken by me to give a meaningful construction to the word 'deal' so that the enactment of the Act will be meaningful, effective and workable for the police to combat crime. Therefore, not only does the plaintiff requires a license, but, the defendant, too, requires one before dealing in metal waste or scrap metals.

If a license under the Second-Hand Dealers Act 1946 is required, whether the defendant by its acts has waived such requirement; whether a party can waive a statutory requirement

[70] The defendant contended that the plaintiff requires a license to deal in metal waste or scrap metals but the same requirement does not apply to them. The defendant also contends that it has not waived the requirement for the plaintiff to have a license by its action. This court finds that both the plaintiff and the defendant in dealing in P1–P6, are dealing in second hand goods within the meaning of *Lau Tee Teah* and therefore both require a license. This court also finds that both the plaintiff and defendant in dealing in P1–P5 are

dealing in metal waste or scrap metals or production waste of metal base which can come under the definition of 'old iron and metals' which are second hand goods as described and specified in the second and third schedule and as such both also require a license under s 6 of the Act. As such the issue as to whether the defendant had waived the requirement for the plaintiff to have a license is a non-issue. Be as it may, the issue as to whether a party can waive a statutory requirement need to be answered. It is an established law that a statutory requirement can never be waived by a party or between parties. Once the legislation has enacted laws that require parties to comply with any provision, parties must comply with such provision. This principle was clearly laid out by the Federal Court in the recent case of *Chase Perdana Bhd v Md Afendi bin Hamdan* [2009] 6 MLJ 783 where His Lordship, Zaki Azmi Chief Justice, had this to say:

> The law on this is quite established. Once it is enacted by legislation that parties are required to comply with any provision, parties must comply with such provision. It is not for any person to waive legislative requirements by an agreement unless the legislation allows it to be done. Legislation enacts laws which in its opinion are for the benefit of the public. It is not for the courts, or anybody for that matter, to say that it need not be followed. This was clearly expressed in *Surajmull Nargoremull v Triton Insurance Company Limited* (1924) LR 52 1A 126 at p 128 where Lord Sumner held as follows:
>
> No court can enforce as valid that which competent enactments have declared shall not be valid, nor is obedience to such an enactment a thing from which a court can be dispensed by the consent of the parties, or by a failure to plead or to argue the point at the outset: *Nixon v Albion Marine Insurance Co* (1867) LR 2 Ex 338. The enactment is prohibitory. It is not confined to affording a party a protection, of which he may avail himself or not as he pleases. It is not framed solely for the protection of the revenue and to be enforced solely at the instance of the revenue officials, nor is the prohibition limited to cases for which a penalty is exigible. The expression of an agreement for sea insurance, otherwise than in a policy, is a thing forbidden in the public interest, and the statutory insistence on a policy is no mere collateral requirement or a prescription of the proper way of making such an agreement. To allow the suit to proceed in defiance of s 7 would defeat the provisions of the law laid down therein.

Whether the failure to have a license renders the agreement between the parties illegal and therefore void and unenforceable

[71] Under s 25 of the Contracts Act 1950 (Act 136), an agreement becomes void if the considerations and objects are unlawful in part. Section 25 states:

> If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object is unlawful, the agreement is void.

[72] This court has made a finding that P1–P6 are second hand goods under the Act and a person requires a license under s 6 to deal in it. Since both the plaintiff and the defendant at the time the agreement was entered into has no license to deal in P1–P6, the agreement is illegal and becomes void and unenforceable.

Damages (if any), to be assessed by the assistant registrar

[73] Since the agreement is void and unenforceable (incapable of performance), the issue of damages does not arise.

CONCLUSION

[74] Therefore, to summarise and in answer to the five issues raised, the court makes a finding that:

(a) There is a valid and enforceable agreement evinced from the series of letters between the plaintiff and the defendant which requires the defendant to sell metal waste or scrap metals to the plaintiff, as and when the metal waste or scrap metals are available, for a period of three years at a fixed price as quoted in the plaintiff's letter dated 29 June 2004.

(b) Since there was a valid agreement, both the plaintiff and the defendant were required under the law to have a license under the Second-Hand Dealers Act 1946 for the purchase or otherwise dealing in metal waste or scrap metals. This is so since the court finds that:

(i) P1–P5 are all forms of metal or metal waste or scrap metals or production waste of metal base;

As such P1–P5 can come under the definition of 'old iron or metals' which are second hand goods as described and specified in the Second and Third Schedule of the Act.

(ii) P1–P6 can be categorised as second hand goods within the definition given in the case of *Lau Hee Teah*. This is so since P1–P6 are production waste as a result of an industrial process which use, among others, metals, to produce electrical components. As such they qualify as items which 'has been used when offered for sale'.

(iii) The word 'deal' or 'deal in' under s 6 of the Act constitute or encompasses both the act of buying or purchasing as well as selling.

Therefore, the plaintiff who buys and then sells the scrap metals for profit and the defendant who sells the scrap metals for profit are both considered to have dealt in or have dealings in scrap metals and as such both of them are required to have a license under s 6 of the Act.

(c) The requirement of a license is a statutory requirement which can never be waived by a party or between parties. It is an established law that once the legislation has enacted laws that require parties to comply with any provisions, parties must comply with such provisions.

(d) The failure to have a license renders the agreement between the parties illegal and therefore void and unenforceable (incapable of performance).

(e) Since the agreement is void and unenforceable, the issue of damages does not arise.

[75] In such circumstances, the plaintiff's claim is dismissed with costs.

COSTS

[76] The defendant submitted that costs of RM120,000 be awarded to them since seven witnesses had testified in the trial which took five days to complete. The plaintiff, on the other hand submitted the sum of RM7,000. Having considered that the defendant too did not have a license to deal in scrap metals as required under the Act, I feel the sum of RM15,000 as costs is adequate.

[77] The plaintiff's claim dismissed with costs of RM15,000.

Plaintiff's claim dismissed with costs.

Reported by Ashok Kumar